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No. 78-1372

# In the Supreme Court of the United States

OCTOBER TERM, 1978

EDWARD ARAMBASICH, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The order of the court of appeals (Pet. App. A) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 20, 1978. A petition for rehearing was denied on February 6, 1979 (Pet. App. B). A petition for a writ of certiorari was filed on March 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether petitioner's motions to consolidate several indictments for trial should have been granted.

## STATEMENT

1. On May 11, 1976, five indictments were filed in the United States District Court for the Northern District of Illinois charging petitioner with violations of the Hobbs Act, 18 U.S.C. 1951. One indictment (76-CR-598) charged petitioner with 45 counts of extortion in his capacity as business agent of Local 444 of the Ironworkers Union. The other four indictments (76-CR-599 through 76-CR-602) likewise charged petitioner with extortion and also alleged that he had conspired to commit extortion. The first indictment named petitioner alone and involved direct payments by steel erection contractors to petitioner in response to his extortionate demands. The other four indictments charged petitioner together with a co-conspirator; a different co-conspirator was named in each indictment. These four indictments alleged that petitioner had demanded that contractors make payments to his co-conspirators, who were then placed on company payrolls but did no work (Pet. App. 2, 6-7).

Each substantive count in the five indictments related to a separate payment, either directly to petitioner or to a "ghost payroller." In some cases the same company both paid petitioner directly and paid a ghost payroller. In other cases, the company made payments only to petitioner or only to the ghost payroller.

Prior to trial, petitioner moved to consolidate all five indictments for trial, but these motions were denied. He also moved to sever his co-defendants in indictments 76-CR-599 through 76-CR-602; these motions were also denied (Pet. App. 2 & n.2).

On September 9, 1976, an additional five-count indictment was returned charging petitioner with failing



to report income in violation of 26 U.S.C. 7206 (76-CR-990). The understated income was derived from the extortionate transactions charged in 76-CR-598 (Pet. App. 7). The tax evasion counts were consolidated for trial with some of the substantive extortion counts charged in 76-CR-598, while others of those counts were severed. After a jury trial of these tax and extortions counts, petitioner was convicted on 23 counts of extortion and five counts of tax evasion, and acquitted on two counts of extortion.[1] He was sentenced to 10 years' imprisonment on each extortion count and three years' imprisonment on each tax count, all of which were to run concurrently (*ibid.*).

Petitioner then proceeded to trial over a period of four months on the remaining counts of 76-CR-598, and the counts contained in 76-CR-599 through 76-CR-602. After trials on stipulated evidence, petitioner was convicted on all but one of the counts in these indictments. The sentences on these convictions were ordered to run concurrently with the sentences imposed in the first trial (Pet. App. 2 n.1).

On appeal of the judgments in the first trial, the court of appeals reversed and remanded for a new trial, holding that the type of reputation evidence adduced by the government and the manner in which it was elicited was prejudicial error (Pet. App. 6-11). On petitioner's appeal of the judgments in the remaining trials, the court of appeals affirmed (Pet. App. 1-4). It is the latter decision that is the subject of this petition.

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[1]The remaining counts of 76-CR-598 that were tried with 76-CR-990 were disposed of during trial on motions for acquittal or pursuant to the government's motion to dismiss.

## ARGUMENT

Petitioner contends (Pet. 8-14) that the trials in all five Hobbs Act indictments (76-CR-598 through 76-CR-602) should have been consolidated to save him from "the expense and ordeal of multiple prosecutions" (Pet. 14). The remedy he asks (*ibid.*) is that the judgments be reversed and the cases remanded for retrial with the counts of 76-CR-598 that have already been reversed and remanded by the court of appeals (see Pet. App. 6-11).

While it is true that the Hobbs Act offenses with which petitioner was charged could have been joined for trial, since they were "of the same or similar character" (Fed. R. Crim. P. 8(a)), it does not follow that the conspiracy indictments, which charged not only petitioner but also various co-defendants, could properly have been joined. These co-defendants did not "participate[ ] in the same act or transaction or in the same series of acts or transactions * * *" (Fed. R. Crim. P. 8(b)). Rather, as the court of appeals held (Pet. App. 4):

> Indictment 76-CR-598 charges Arambasich alone with extorting payments from contractors. The other four indictments charged different extortion conspiracies, each indictment involving a different co-conspirator. In each of these four indictments Arambasich is alleged to have extorted payments through the co-conspirator's function as a "ghost payroller." No co-conspirator is alleged to have participated in any of the other conspiracies, and no common scheme involving all defendants is alleged.

And even if, contrary to the court of appeals' conclusion, the co-conspirators' conduct would have



permitted joinder in a single indictment under Rule 8(b), a joint trial was subject to the objection by the co-conspirators that they would be prejudiced by the mass of evidence relating to extortionate transactions in which they took no part. See *Kotteakos* v. *United States*, 328 U.S. 750, 773-774 (1946).

Petitioner argues (Pet. 11), however, that his cases should have been severed from those of his co-defendants, so that all the charges against petitioner could then have been consolidated. The short answer (see Pet. App. 2 n.2) is that petitioner did not request severances on the ground that such action would facilitate consolidation of the charges against him.[2] He cannot complain now if the trial court did not consider this additional ground for severance. See, *e.g.*, *Ginsberg* v. *United States*, 96 F. 2d 433, 436 (5th Cir. 1938).[3]

In any event, it is a settled principle that defendants jointly indicted should be tried together, particularly where conspiracy is alleged, unless they can make a compelling showing of prejudice. This presumption in favor of joint trials serves the interests of judicial

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[2]In his severance motions he alleged only that if his co-defendants testified, the jury might draw adverse inferences about his failure to testify; that he would be prevented from calling his co-defendants as witnesses unless a severance was granted; and that testimony admissible only against his co-defendants would prejudice him if he was tried with his co-defendants.

[3]Because the five indictments were returned at the same time, the Department of Justice policy that several federal offenses arising out of a single transaction generally should be tried together in a single federal prosecution (see *Petite* v. *United States*, 361 U.S. 529 (1960)) does not apply to any of the counts of these indictments, even assuming they could be properly viewed as arising out of the same transactions.

economy and reduces the burden on witnesses and the expenses of trial. See *United States* v. *Perez*, 489 F. 2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974); *United States* v. *Cervantes*, 466 F. 2d 736, 739 (7th Cir.), cert. denied, 409 U.S. 886 (1972); *United States* v. *Hines*, 455 F. 2d 1317, 1334 (D.C. Cir. 1971), cert. denied, 406 U.S. 975 (1972).

Here, the government's grouping of counts in five separate indictments was logical and prevented wasteful duplication of proof. It recognized that the co-defendants were likely to complain of prejudice if they were joined with petitioner's other co-defendants, or with the 45-count indictment charging payments made directly to petitioner. Further, it minimized overlapping proof. Contrary to petitioner's allegations (Pet. 10-12), the government did not prove its case once in 76-CR-598 and then again in succeeding trials.

Even in cases in which a company made payments both directly to petitioner (charged in 76-CR-598) and to a ghost payroller (charged in 76-CR-599 through 76-CR-602) in response to the same demand by petitioner, the proof in the various trials was not the same. Although it was necessary in some cases to prove the extortionate demand in two trials, the proof of payment was different in each indictment and was made only once. If, however, petitioner were severed from his co-defendants, as he now urges, proof of payment would also have to have been made twice.

In addition, in a number of instances, the only payment that a contractor made in response to a particular demand by petitioner was payment to a ghost payroller. All elements of these transactions were



proved only once, in the trials in 76-CR-599 through 76-CR-602.[4] Severing petitioner from his co-defendants would have required duplicating the entire proof of these substantive and conspiracy allegations, first in petitioner's consolidated trial and then again in the co-conspirators' trials. Further, any evidence rebutting defense witnesses would, in all likelihood, have had to be presented twice. In these circumstances, judicial economy was served by grouping the substantive charges against petitioner relating to ghost payroller payments together with the corresponding conspiracy counts, and then charging petitioner together with his co-conspirator in the same indictment.

Petitioner's current claim of prejudice must be weighed against the wasteful duplications of proof that would have resulted from severance. But petitioner made no showing of prejudice in the trial court, and even now makes no particularized claim of prejudice, simply referring generally to "the expense and ordeal of multiple prosecutions" (Pet. 14). This assertion, however, does not withstand examination. Each of the counts against him involved a different violation of the Hobbs Act (see *United States* v. *Addonizio*, 451 F. 2d 49, 59-60 (3d Cir. 1971), cert. denied, 405 U.S. 936 (1972); *United States* v. *Tolub*, 309 F. 2d 286, 289 (2d Cir. 1962)), so he would ultimately have to prepare a defense to each of these charges, whether they were tried together or in a series. And since the last four trials were conducted on the basis of stipulated evidence, any inconvenience to petitioner from separate

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[4]See, *e.g.*, 76-CR-599, Counts 1 and 4 (Security Fence Co.); 76-CR-600, Counts 1, 4 and 6 (Integrated Building Systems and Nu-Era Fence Erectors, Inc.); 76-CR-601, Counts 1 and 2 (Ruben E. Smith Construction Co.); 76-CR-602, Counts 1 and 2 (Leonard Warden Co.).

trials could not have been significant. Indeed, petitioner's requested relief in this Court—retrial of all the counts that are the subject of this petition, together with the counts already returned to the district court for retrial in 76-CR-598—belies his complaint that he had already been subjected to an unacceptable "ordeal" of multiple prosecutions.[5]

In these circumstances, the district court did not abuse its discretion in denying the motion to consolidate.[6]

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[5]Indeed, even if the district court had improperly denied petitioner's severance motion, it is unclear what relief would be available. Often, an improper denial of severance can be remedied by remand for a new trial without the co-defendant. See, *e.g.*, *United States* v. *Vigil*, 561 F. 2d 1316 (9th Cir. 1977) (co-defendant would testify for defendant if trials severed). But where the prejudice suffered is not to the ability to defend against the charges but instead entails the inconvenience of multiple trials, a remand for yet another, consolidated trial does not provide a cure.

[6]Petitioner relies on *Jeffers* v. *United States*, 432 U.S. 137 (1977), in contending that the multiple prosecutions in his case violated the Double Jeopardy Clause. But *Jeffers* involved two closely related offenses arising out of the same transactions, one of which was assumed by the Court to be a lesser included offense of the other; offenses in those circumstances are "the same" for double jeopardy purposes since they fail to meet the test that each must include an element not contained in the other (*id.* at 151-152). Here, by contrast, while petitioner was charged in numerous counts with the same type of offense (*i.e.*, conspiracy or extortion), each count involved a separate payment in response to extortionate demands; involving as they did separate transactions, petitioner's numerous conspiracy and extortion offenses simply were not the same for purposes of double jeopardy analysis.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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